

Rehearing en banc granted by order filed 4/1/99;
published opinion filed 2/19/99 is vacated.

PUBLISHED

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

LYNNE S. TAYLOR,
Plaintiff-Appellant,

and

KEISHA JOHNSON,

Plaintiff,

v.

VIRGINIA UNION UNIVERSITY,
Defendant-Appellee.

KEISHA JOHNSON,
Plaintiff-Appellant,

and

LYNNE S. TAYLOR,

Plaintiff,

v.

VIRGINIA UNION UNIVERSITY,
Defendant-Appellee.

Appeals from the United States District Court
for the Eastern District of Virginia, at Richmond.
James R. Spencer, District Judge.
(CA-96-517)

Argued: September 24, 1998

Decided: February 19, 1999

No. 97-1667

No. 97-1669

Before MURNAGHAN and HAMILTON, Circuit Judges,
and MAGILL, Senior Circuit Judge of the
United States Court of Appeals for the Eighth Circuit,
sitting by designation.

Affirmed in part, reversed in part, and remanded by published opinion. Senior Judge Magill wrote the majority opinion, in which Judge Murnaghan joined. Judge Hamilton wrote an opinion concurring in part and dissenting in part.

COUNSEL

ARGUED: Thomas Hunt Roberts, THOMAS H. ROBERTS & ASSOCIATES, P.C., Richmond, Virginia, for Appellants. Henry L. Marsh, III, HILL, TUCKER & MARSH, Richmond, Virginia, for Appellee. **ON BRIEF:** Clarence M. Dunnaville, Jr., Ephraim R. Walker, III, HILL, TUCKER & MARSH, Richmond, Virginia, for Appellee.

OPINION

MAGILL, Senior Circuit Judge:

In these consolidated Title VII sex discrimination cases, Lynne Taylor appeals from the district court's grant of judgment as a matter of law (JAML) in favor of Virginia Union University (VUU) on her disparate treatment claims. Keisha Johnson appeals from a jury verdict in favor of VUU on her disparate treatment claims and constructive discharge claim, and from the district court's dismissal of her sexual harassment claim. We affirm in part, reverse in part, and remand.

I.

A. Taylor

VUU hired Taylor as a probationary officer in its Police Department in August 1992. Despite successfully completing her ninety-day probationary period in November, she was not issued a firearm until almost one year later. VUU was not responsible for this delay, and the delay did not impact her job duties, performance, or evaluations in any way. During 1993, VUU's Chief of Police, Eugene Wells, gave Taylor an unsatisfactory performance evaluation. He rated Taylor's communications skills as being only "marginal," a classification below that of "satisfactory," and informed her that improvement was necessary.

Despite her communication problems, Taylor was often asked to serve as Acting Shift Supervisor and, as such, frequently supervised other officers.¹ After numerous appointments as Acting Shift Supervisor, Taylor requested that she be promoted to the rank of Corporal. Although most male officers who were consistently appointed as Acting Shift Supervisors were promoted to Corporal, Taylor was not promoted. VUU, pointing to a policy limiting promotions to those candidates receiving ratings of "satisfactory" or better in their evaluations, contends that Taylor was not promoted because she received only a "marginal" evaluation from Chief Wells.

During Taylor's employment at VUU, Chief Wells selected six male officers to attend the Police Academy, but refused to select Taylor. Indeed, despite his belief that Police Academy attendance was important, Chief Wells never sent any woman to the Academy. He even told a fellow officer that "he was never going to send a female to the Academy." Trial Tr. at 30, reprinted in J.A. at 70 (testimony of Officer Terry). Although some of the selected male officers had more seniority than Taylor, at least two of them had less seniority. It is undisputed that Police Academy attendance "gave [an officer] a

¹ The duties of an Acting Shift Supervisor included supervising all of the activities on the shift, supervising each officer on the shift, assigning officers to work details, and ensuring that officers complied with VUU policies and procedures.

better understanding of [his] job, how to make arrests and just perform [his] job better." Id. at 29, reprinted in J.A. at 69. It also is undisputed that Police Academy attendance positively impacted promotion opportunities. For example, no officer was ever promoted above Corporal without having attended the Academy.

In October 1994 two VUU officers discovered Taylor at a fraternity party in an all-male dormitory. Taylor was off duty at the time and was attending the party as a guest. Although she denies consuming any alcohol at the party, one of her superiors testified that she was under the influence of alcohol and that she admitted having a few drinks. Taylor was discharged in November 1994, two years and three months into her job, for violating VUU policies governing alcoholic beverages and coed visitation.

Taylor filed suit against VUU under Title VII, claiming that VUU had discriminated against her in the terms and conditions of her employment. Taylor brought only disparate treatment claims, alleging that, but for her sex, she (1) would have received her firearm sooner, (2) would have been selected to attend the Police Academy, (3) would have been promoted to Corporal, and (4) would not have been discharged.

B. Johnson

VUU hired Johnson as a probationary officer in its Police Department in July 1993. Johnson received her handgun shortly after completing her ninety-day probationary period and, by all accounts, performed her job admirably. Chief Wells never gave Johnson a negative evaluation, but instead rated her as "satisfactory" or "above average" in all areas. At least in part because of her obviously good performance, Johnson was often appointed as Acting Shift Supervisor. However, she was never promoted to Corporal, unlike most male officers who were consistently appointed as Acting Shift Supervisors. Chief Wells also refused to select Johnson to attend the Police Academy.

Despite refusing to send Johnson to the Police Academy, Chief Wells told her that "I don't know why you can't be the next Lieutenant." Trial Tr. at 96, reprinted in J.A. at 136 (testimony of Johnson).

He also told her that he would promote her "if[*she*] did the right thing." *Id.* at 67, reprinted in J.A. at 107. Johnson subsequently applied for a promotion to Lieutenant. Johnson's application was, in large part, doomed to fail. The evidence showed that VUU had never promoted an officer to Lieutenant unless that officer attended the Police Academy. The evidence also showed that Police Academy training, which gives "a better understanding of[the] job, how to make arrests and just perform [the] job better," *id.* at 29, reprinted in J.A. at 69 (testimony of Officer Terry), impacted the promotion process. Johnson's final combined score on the written and oral examinations was three points lower than the person selected for promotion, Quinton Terry, Sr. Lieutenant Terry, a male officer who commenced employment with VUU on the same date as Johnson, was attending the Academy during the promotion process.

VUU did not select Johnson for the Lieutenant position and did not promote her to any other position. She resigned from VUU in September 1994, only one year and two months into her job.

Johnson subsequently filed suit against VUU under Title VII, claiming that VUU had discriminated against her in the terms and conditions of her employment. Johnson brought disparate treatment claims, a constructive discharge claim, and a sexual harassment claim. For her disparate treatment claims, she alleged that, but for her sex, she (1) would have received her firearm sooner, (2) would have been selected to attend the Police Academy, and (3) would have been promoted to Lieutenant or Corporal.

C. District Court Proceedings

The district court consolidated Taylor's and Johnson's cases. Upon VUU's pretrial motion for summary judgment, the district court dismissed Johnson's sexual harassment claim on the ground that she failed to exhaust her administrative remedies. The court allowed all of the remaining disparate treatment and constructive discharge claims to proceed to trial. During trial, the court refused to allow Johnson and Taylor to introduce testimony that Chief Wells often referred to women in derogatory terms, including his reference to one woman as "ha[ving] good pussy." The court also refused to allow them to introduce evidence that Chief Wells had sexually harassed

another female employee by looking down her blouse, calling her at home on several occasions, and touching her. At the conclusion of the evidence, the court granted JAML in favor of VUU on Taylor's discrimination claims, but sent Johnson's claims to the jury. The jury reached a verdict in favor of VUU, and the court entered judgment thereon. Johnson and Taylor now appeal.

II. JOHNSON'S CLAIMS ON APPEAL

A. Disparate Treatment and Constructive Discharge

Johnson's main contention on appeal is that the district court committed reversible error in excluding evidence that Chief Wells often referred to women in derogatory terms and harassed another female employee. We agree.

"The general policy of the Federal Rules [of Evidence] . . . is that all relevant material should be laid before the jury as it engages in the truth-finding process." Mullen v. Princess Anne Volunteer Fire Co., 853 F.2d 1130, 1135 (4th Cir. 1988). Evidence is relevant if it "ha[s] any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Fed. R. Evid. 401 (emphasis added). Evidence may not be excluded as irrelevant "if it has even the slightest probative worth." Robinson v. Runyon, 149 F.3d 507, 512 (6th Cir. 1998) (quotations omitted).

We review the district court's evidentiary rulings for an abuse of discretion. See Persinger v. Norfolk & Western Ry., 920 F.2d 1185, 1187 (4th Cir. 1990). "[T]he exclusion of probative evidence is not to be lightly disregarded," Mullen, 853 F.2d at 1135, and constitutes reversible error if it affects the substantial rights of the parties. See Fed. R. Civ. P. 61; Fed. R. Evid. 103(a).

In this case, evidence that Chief Wells often referred to women in derogatory terms, once stating that a woman "ha[d] good pussy," and had harassed another female employee is relevant to Johnson's disparate treatment claims and her constructive discharge claim. "[W]here plaintiffs have asserted a theory of Title VII liability based upon dis-

parate treatment[,] [d]iscriminatory intent is an essential element of proof," Warren v. Halstead Indus., Inc., 802 F.2d 746, 752 (4th Cir. 1986), and it "is well-established that prior acts and statements should be admitted where necessary to show state of mind." Mullen, 853 F.2d at 1133.

"[D]erogatory remarks indicative of a discriminatory attitude are generally admissible to prove discriminatory treatment." Ross v. Buckeye Cellulose Corp., 980 F.2d 648, 655 (11th Cir. 1993) (quoting Brown v. Trustees of Boston Univ., 891 F.2d 337, 349 (1st Cir. 1989)); see also Denesha v. Farmers Ins. Exch., ___ F.3d ___, 1998 WL 762521, at *6 (8th Cir. Nov. 3, 1998) ("It is well settled that a plaintiff can meet his burden of proving intentional discrimination by providing evidence of remarks by decision makers reflecting a discriminatory attitude."). Johnson is trying to prove that she was disparately treated because of her sex, and testimony that Chief Wells referred to women in derogatory terms is probative of this claim. See, e.g., Heyne v. Caruso, 69 F.3d 1475, 1480 (9th Cir. 1995) ("evidence of the employer's disparaging remarks about women in general [is] relevant" to a disparate treatment claim); Abrams v. Lightolier Inc., 50 F.3d 1204, 1214-15 (3d Cir. 1995) (evidence that supervisor referred to older employees as "dinosaurs" and "old men" was relevant and admissible in age discrimination suit); EEOC v. Manville Sales Corp., 27 F.3d 1089, 1093-95 (5th Cir. 1994) (evidence of superior's age-related pejorative remarks were wrongfully excluded in a disparate treatment case because "[e]vidence of vocalizations and verbalizations of the anti-age based feelings of a supervisor can be, and often are, used to prove unlawful discrimination"); Estes v. Dick Smith Ford, Inc., 856 F.2d 1097, 1104 (8th Cir. 1988) ("Estes is trying to prove by a preponderance of evidence that his supervisors discharged him because he is black, and testimony that these same supervisors on occasion used racial insults against him and other black people is certainly probative of this claim."); Hunter v. Allis-Chalmers Corp., 797 F.2d 1417, 1423 (7th Cir. 1986) (evidence that supervisor used racial epithets was admissible to show his racial attitude in employment discrimination action).

Similarly, evidence that Chief Wells harassed Johnson and other women is relevant to Johnson's claim. Evidence of harassment, "though not the subject of a distinct claim, is relevant to the determi-

nations of intent and pretext" in a disparate treatment case. Warren, 802 F.2d at 753; see also Heyne, 69 F.3d at 1480 ("evidence of an employer's sexual harassment of female employees other than the plaintiff and evidence of the employer's disparaging remarks about women in general [are] relevant" to a plaintiff's disparate treatment claim). The fact that Chief Wells condoned, and maybe even created, a sexually hostile atmosphere "clearly is relevant" to Johnson's disparate treatment claim "because it illustrates[his] attitude[]" toward women, including Johnson. Robinson, 149 F.3d at 512; see also EEOC v. Farmer Bros. Co., 31 F.3d 891, 898 (9th Cir. 1994) ("Because hostility against women underlies decisions to discharge or to refuse to hire women because of their gender, evidence of sexual harassment often will be relevant to claims of gender-based employment discrimination.").

Moreover, the excluded evidence clearly is relevant to Johnson's constructive discharge claim. To prevail on this claim, Johnson was required to show "(1) deliberateness of the employer's actions and (2) intolerability of the working conditions." Martin v. Cavalier Hotel Corp., 48 F.3d 1343, 1354 (4th Cir. 1995) (quotations omitted). The excluded evidence tends to make more probable Johnson's contention that her resignation was reasonably foreseeable, see id. at 1356 (deliberateness may be shown by evidence that employee's resignation was the reasonably foreseeable consequence of employer's conduct), and that her working conditions were intolerable. This evidence, thus, is relevant to Johnson's constructive discharge claim. See White v. Honeywell, Inc., 141 F.3d 1270, 1276 (8th Cir. 1998) (court erred in excluding derogatory statement because it was "relevant in resolving the ultimate question of constructive discharge--whether the workplace was so racially abusive and hostile that a reasonable employee would have felt compelled to quit").

VUU contends that the excluded evidence would be unfairly prejudicial and, thus, was properly excluded under Rule 403 of the Federal Rules of Evidence. We disagree. VUU has not suggested how the excluded evidence is prejudicial other than in the same context in which it is relevant--namely, it tends to show that VUU and Chief Wells's conduct might have been motivated by sexual animus. "Whatever hostility a juror hearing the use of these epithets would feel results from a belief that the words reveal a discriminatory out-

look. The emotional reaction claimed to be unfairly prejudicial is thus closely tied to the inquiry into state of mind that is specifically required" Mullen, 853 F.2d at 1135. We recognize that

[c]ircumstantial proof of discrimination typically includes unflattering testimony about the employer's history and work practices--evidence which in other kinds of cases may well unfairly prejudice the jury against the defendant. In discrimination cases, however, such background evidence may be critical for the jury's assessment of whether a given employer was more likely than not to have acted from an unlawful motive.

Estes, 856 F.2d at 1103; see also Abrams, 50 F.3d at 1215 ("discriminatory comments by an executive connected with decision-making process will often be the plaintiff's strongest circumstantial evidence of discrimination" and "they are highly relevant"). We believe that Rule 403 does not support the exclusion of Chief Wells's sexually derogatory remarks and harassing conduct.

We hold, therefore, that the district court abused its discretion in excluding this evidence. Because the excluded evidence "can be highly probative of unlawful discriminatory intent, we cannot say with conviction that this evidence would not have affected the jury's determination. The decision to exclude testimony as to [Chief Wells's] remarks [and conduct] affected the plaintiffs' substantial rights and was an abuse of discretion that requires us to reverse the judgment of the trial court." Manville Sales Corp., 27 F.3d at 1095; see also Robinson, 149 F.3d at 515 (remanding for new trial in a sex discrimination, disparate treatment case where district court erroneously excluded one piece of circumstantial evidence because plaintiff

2 Although we remand for a new trial on Johnson's Police Academy, promotion, and constructive discharge claims, we affirm the judgment in favor of VUU on Johnson's firearm claim. The excluded evidence is irrelevant to that claim, and the evidence presented at trial showed that VUU had nothing to do with the delay Johnson experienced before receiving her firearm. Moreover, Johnson's counsel conceded during oral argument that the delay did not give rise to a separate cognizable Title VII claim.

"relied heavily on circumstantial evidence to carry her burden of proof," "each piece of evidence served to complete part of the puzzle," and "[t]he absence of even one piece of highly relevant evidence may have made the difference in the jurors' minds and its exclusion was therefore far from harmless").

B. Sexual Harassment

Johnson further contends that the district court erred in dismissing her sexual harassment claim for failure to exhaust her administrative remedies. Johnson concedes that her EEOC charge did not make any allegation of sexual harassment, but asserts that the affidavit filed in support of her EEOC charge is sufficient. We agree.

Johnson's pro se affidavit, while never using the legal terms "hostile work environment" or "sexual harassment," sets forth several incidents of harassment and specifically invites the EEOC to investigate those incidents. Her affidavit avers:

On several times [Chief Wells] called me at home on thing [sic] that could wait until the next day. He has touched me on the arm on several times while talking to me. He stated he hire me [sic] because he liked me. . . . He has called me in his office for hours at a time, away from job to talked [sic] to me.

EEOC Aff. at 2, reprinted in J.A. at 353. Her affidavit also alleges that Chief Wells did "many malicious things" to her, and identifies six people who could speak on her behalf about Chief Wells's conduct. Id.

This Court has explained that "[o]nly those discrimination claims stated in the initial charge, those reasonably related to the original complaint, and those developed by reasonable investigation of the original complaint may be maintained in a subsequent Title VII lawsuit." Evans v. Technologies Applications & Serv. Co., 80 F.3d 954, 963 (4th Cir. 1996). It seems beyond cavil that the "reasonable investigation" of an EEOC complaint would include an investigation of facts alleged in an affidavit filed with the complaint. Therefore, "we

may consider [the plaintiff's] statements in a sworn affidavit that she filed in support of the charge" when determining whether a claim has been properly exhausted. Cheek v. Western and Southern Life Ins. Co., 31 F.3d 497, 502 (7th Cir. 1994); see also Marshall v. Federal Express Corp., 130 F.3d 1095, 1098 (D.C. Cir. 1997) (assuming this statement of law is correct); Gipson v. KAS Snacktime Co., 83 F.3d 225, 229 (8th Cir. 1996) (looking to both EEOC charge and affidavit when determining whether claim was exhausted); Clark v. Kraft Foods, Inc., 18 F.3d 1278, 1280 (5th Cir. 1994) (same); Emmons v. Rose's Stores, Inc., 5 F. Supp. 2d 358, 363 (E.D.N.C. 1997) (same), aff'd, 141 F.3d 1158 (4th Cir. 1998). This is especially true here, where Johnson specifically identified witnesses to Chief Wells's harassing conduct and invited the EEOC to contact those witnesses. See Cheek, 31 F.3d at 502 ("[a]llegations outside the body of the charge may be considered when it is clear that the charging party intended the agency to investigate the allegations").

After construing Johnson's EEOC charge and affidavit "with utmost liberality," Alvarado v. Board of Trustees of Montgomery Community College, 848 F.2d 457, 460 (4th Cir. 1988) (quotations omitted), see also Gipson, 83 F.3d at 229 (court must read EEOC charge and affidavit "liberally"), we believe that Johnson's affidavit sets forth a sexual harassment claim. The EEOC defines sexual harassment as "[u]nwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature . . . when . . . such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment." 29 C.F.R. § 1604.11(a)(1995). Johnson's affidavit clearly complains of harassment. See Webster's Ninth New Collegiate Dictionary at 552 (defining "harass" as "to annoy persistently"). Conduct such as telling Taylor that he liked her, touching her on the arm, and calling her at home, when construed liberally, may be considered to be of a sexual nature. Cf. Gipson, 83 F.3d at 229 (mere allegation by plaintiff to EEOC that he was "continually harassed" is sufficient to set forth a hostile work environment claim). Accordingly, we hold that the district court erred in dismissing Johnson's sexual harassment claim and, thus, remand for reinstatement of this claim.

C. Other Contentions

Johnson raises several other contentions on appeal. We address some of these contentions because they will be relevant during the new trial.³

Johnson contends that the district court erred in excluding evidence that Chief Wells solicited a prostitute in 1995. This occurred one year after Johnson left VUU. We have no trouble finding this evidence irrelevant and unfairly prejudicial and, thus, properly excludable under Rule 403.

Johnson also contends that the district court erred in refusing to submit a more favorable Price Waterhouse⁴ instruction to the jury. A careful review of the record, however, shows that the court issued the very instruction Johnson tendered. Compare Plaintiff's Proposed Jury Instruction No. 34 with Trial Tr. at 277, lines 16-22. Accordingly, the district court did not err.

III. TAYLOR'S CLAIMS ON APPEAL

We review de novo the district court's grant of JAML, see Malone v. Microdyne Corp., 26 F.3d 471, 475 (4th Cir. 1994), and consider the evidence in the light most favorable to Taylor. See id. at 472 n.1. A district court should grant a moving party's motion for judgment as a matter of law only when "there is no legally sufficient evidentiary basis for a reasonable jury to find for [the non-moving] party." Fed. R. Civ. P. 50(a)(1).

A. Police Academy Claim⁵

³ We need not address her contention that the district court's answers to jury questions in the course of deliberations constituted reversible error because we are already remanding for a new trial. See United States v. Lankford, 955 F.2d 1545, 1553 n.19 (11th Cir. 1992).

⁴ Price Waterhouse v. Hopkins, 490 U.S. 228 (1989).

⁵ Taylor's counsel conceded during oral argument that the delay Taylor experienced before receiving her handgun did not constitute a separate cognizable claim under Title VII. Moreover, the evidence shows that VUU is not responsible for the delay. Accordingly, we affirm the grant of JAML on this claim.

Taylor contends that the district court erred in granting JAML on her Police Academy claim. We agree.

We believe that Taylor is entitled to a Price Waterhouse mixed-motive analysis on this claim. An employer violates Title VII whenever sex "plays an actual role in an employment decision, regardless of other considerations that may independently explain the outcome." Fuller v. Phipps, 67 F.3d 1137, 1142 (4th Cir. 1995). An employer, thus, is liable for sex discrimination if sex "was a motivating factor for any employment practice, even though other factors also motivated the practice." 42 U.S.C. § 2000e-2(m). A plaintiff is entitled to mixed-motive treatment whenever she presents "direct evidence that decisionmakers placed substantial negative reliance on an illegitimate criterion." Fuller, 67 F.3d at 1142 (quotations omitted). If the plaintiff satisfies this evidentiary burden, the defendant cannot escape liability. See id. To the contrary, "[p]roof by the employer that it would have reached the same determination without any discriminatory animus [only] limit[s] the remedies available to the plaintiff." Id.

When viewed in the light most favorable to Taylor, the evidence shows that Chief Wells had the sole authority to select officers to attend the Police Academy. He once told a fellow officer that he would never send a woman to the Police Academy. He refused to send any female to the Academy during his tenure. In contrast, Taylor witnessed six male officers attend the Academy during her brief two-year career with VUU. This constitutes sufficient direct evidence to entitle Taylor to mixed-motive treatment. See id. (direct evidence is that which "reflect[s] directly the alleged discriminatory attitude" and "bear[s] directly on the contested employment decision").

VUU contends that substantial evidence shows that Taylor's sex had nothing to do with her inability to attend the Academy. However, Taylor rebutted most of this evidence. For example, VUU suggests that only officers more senior or more favorably rated than Taylor were sent to the Academy. However, Taylor showed that junior male officers attended the Academy during her career. She also showed that Chief Wells, although consistently appointing her as Acting Shift Supervisor, was the person responsible for her poor evaluation. This is the same Chief Wells who often referred to women in derogatory terms and stated he would never send a woman to the Academy. VUU

also contends that the male officers were sent only because they had expressed an interest in promotion to a position higher than Corporal. However, the evidence showed that Chief Wells never sent Johnson, a female officer who wanted such a promotion, to the Academy. We also note that Chief Wells never testified as to his reason for refusing to select Taylor. Because VUU cannot escape liability in light of the direct evidence of sex discrimination with respect to Taylor's Police Academy claim, see id., the district court erred in granting JAML to VUU on this claim.⁶

B. Failure To Promote

Taylor also contends that she submitted sufficient evidence to defeat JAML with respect to her failure to promote claim. We agree.

We first point out that Taylor is not entitled to mixed-motive treatment on this claim. The only direct evidence of discrimination presented in this case is Chief Wells's statement that he would never send a female to the Academy. The evidence showed, however, that Police Academy attendance is unnecessary for promotion to Corporal. Because Police Academy attendance is irrelevant to Taylor's promotion claim, Chief Wells's statement does not require a mixed-motive analysis. See Fuller, 67 F.3d at 1142 (mixed-motive analysis appropriate only where discriminatory statements "bear directly on the contested employment decision").

Therefore, we utilize the burden-shifting standard set forth in McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973), to examine this claim. Under this standard, a plaintiff must first make a prima facie showing of discrimination. The defendant then bears the burden of articulating a legitimate, nondiscriminatory reason for its actions. If the defendant does so, the burden shifts back to the plaintiff to prove by a preponderance of the evidence that the defendant's

⁶ We would reach the same result if we employed the analysis set forth in McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973). Sufficient evidence exists by which a jury could reasonably disbelieve VUU's articulated non-discriminatory reasons for refusing to send Taylor to the Academy, and conclude that discrimination was the real reason.

legitimate reasons are merely a pretext for sexual discrimination. See St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502, 506-10 (1993).

To establish a prima facie case, a "plaintiff must prove that (1) plaintiff is a member of a protected group; (2) plaintiff applied for the position in question; (3) plaintiff was qualified for the position; and (4) plaintiff was rejected for the position under circumstances giving rise to an inference of unlawful discrimination." Carter v. Ball, 33 F.3d 450, 458 (4th Cir. 1994) (quotations omitted). The parties disagree as to whether Taylor satisfied the third element.

On its face, the evidence suggests that Taylor was unqualified for promotion to Corporal. According to VUU policy, only those officers who achieved a rating of "satisfactory" or above in all areas of their most recent performance evaluation were eligible for promotion. However, Taylor received a less than "satisfactory" rating in her performance evaluation.

We are disconcerted by the fact that Chief Wells is the sole person responsible for Taylor's less than satisfactory evaluation which, supposedly, rendered her "unqualified." The evidence (particularly when considering the improperly excluded evidence) tends to suggest that Chief Wells may have had a discriminatory motive for giving her a negative evaluation. Moreover, the continuous appointment of Taylor as Acting Shift Supervisor tends to suggest that Chief Wells was satisfied with Taylor's performance, notwithstanding his evaluation to the contrary. Indeed, most male officers who were consistently appointed as Acting Shift Supervisors were promoted to Corporal. Viewing the evidence in the light most favorable to Taylor, we conclude a reasonable jury could determine that Taylor was qualified for the promotion and, thus, that she satisfied her prima facie case. Similarly, a reasonable jury could conclude that VUU's reliance on Chief Wells's poor evaluation was pretextual for sex discrimination. The district court, thus, erred in granting JAML to VUU on this claim.

C. Discriminatory Discharge Claim

Taylor finally contends that the district court erred in granting JAML on her discriminatory discharge claim. We agree.

Once again, we use the familiar McDonnell Douglas burden-shifting scheme in analyzing this claim. To establish a prima facie case, Taylor is required to show "that: (1) she is a member of a protected class; (2) she was qualified for her job and her job performance was satisfactory; (3) she was fired; and (4) other employees who are not members of the protected class were retained under apparently similar circumstances." Hughes v. Bedsole, 48 F.3d 1376, 1383 (4th Cir. 1995). The parties disagree only as to whether Taylor satisfied the fourth element.

Taylor was allegedly discharged for violating VUU policies governing alcohol and fraternization after she attended a fraternity party.⁷ As a general rule, this court "compare[s] only discipline imposed for like offenses in sorting out claims of disparate discipline under Title VII." Cook v. CSX Transp. Corp., 988 F.2d 507, 511 (4th Cir. 1993). Here, evidence suggests that VUU did not discipline male officers for fraternizing with students. Indeed, both Taylor and Officer Tommy Harrell testified that male officers fraternized, and in some instances engaged in sexual relations, with female students, but were not disciplined for their misconduct. See Trial Tr. at 113, reprinted in J.A. at 153 (testimony of Taylor); Trial Tr. at 44-45, reprinted in J.A. at 84-85 (testimony of Harrell). Although no specific violations or violators are mentioned in the record, a jury could certainly conclude from the testimony that VUU treated more serious infractions by male officers with greater leniency.

Moreover, we note that Taylor was discharged only after Chief Wells specifically "recommend[ed] that Patrol Officer Taylor be terminated." Letter from Chief Wells to Colonel Anthony Manning, Vice President for University Relations (Oct. 24, 1994), reprinted in J.A. at 373. In conjunction with the apparent dissimilar discipline of Taylor vis-a-vis male officers, the evidence of Chief Wells's sexual animus tends to suggest that this recommendation was improperly based on Taylor's sex. Viewing the evidence in the light most favorable to Taylor, we find that a reasonable jury could conclude that

⁷ There is conflicting testimony concerning whether alcohol was served at the party and whether Taylor drank any alcohol. Because we view the evidence in the light most favorable to Taylor, we credit her testimony that alcohol was not available and that she did not drink any alcohol.

VUU discharged Taylor because of her sex. Therefore, the district court erred in granting JAML to VUU on this claim.

IV.

For the foregoing reasons, we affirm in part, reverse in part, and remand for further proceedings in accordance with this opinion.

AFFIRMED IN PART, REVERSED IN PART,
AND REMANDED

HAMILTON, Circuit Judge, concurring in part and dissenting in part:

I agree with the majority opinion that: (1) VUU's alleged failure to promptly issue firearms to Johnson and Taylor was not discriminatory; and (2) evidence of Chief Wells' solicitation of a prostitute in 1995 was properly excluded by the district court. However, I dissent from the majority opinion in every other respect. I would affirm the district court's grant of judgment as a matter of law in favor of VUU on all of Taylor's claims. I would also affirm the district court's rulings excluding evidence bearing on the claims brought by Johnson. Finally, I would affirm the district court's grant of summary judgment in favor of VUU on Johnson's claim of sexual harassment.

I.

The VUU campus police department (the Department) consists of approximately twenty police officers. Members of the Department enter at the rank of patrol officer after a ninety-day probationary period and can subsequently be promoted to the rank of corporal, sergeant, or lieutenant. For promotion to any rank higher than corporal, both oral and written examinations are required.

Until 1993, overall supervision of the Department was in the hands of Walter H. Miller, VUU's Vice President for University Services. For approximately a year thereafter, overall supervision of the Department was in the hands of S. Dallas Simmons, VUU's President. Then in July 1994, overall supervision of the Department shifted to the hands of Anthony E. Manning, VUU's Vice President for University

Relations. Overall supervision of the Department included making significant personnel decisions such as hiring, firing, and promoting, with both formal and informal input from the Department's Chief of Police (Chief). However, the decision to recommend an individual for promotion to a rank above corporal, was made by a panel of individuals from both inside and outside VUU. This panel consisted of individuals from the Virginia Commonwealth University police department, the City of Richmond's police department, VUU faculty members, and certain senior officers in the Department. While the Chief was not a member of this panel, he would receive and forward the panel's recommendation to the Department Supervisor.

At all times relevant to this appeal, Eugene Wells (Chief Wells) served as the Department's Chief. In this position, Chief Wells was responsible for the daily operation and administration of the Department, including the individual assignment of Department personnel and scheduling. Furthermore, as previously mentioned, Chief Wells had input with respect to significant personnel decisions, although the ultimate decision making authority rested with the Department Supervisor. However, Chief Wells was authorized to select who among the Department's officers could attend the Police Academy operated by the Virginia Commonwealth University (Police Academy).¹

Of relevance to this appeal, VUU's personnel manual required the following of a patrol officer in order to be promoted to the rank of corporal: (1) a minimum of six months as a VUU patrol officer; (2) no arrests for a criminal offense in the past twenty-four months unless found not guilty in a court of law; (3) ratings of satisfactory or above in all areas on the patrol officer's most recent performance evaluation; and (4) service with good conduct as evidenced by no disciplinary action within the previous six months. VUU's personnel manual

¹ VUU did not have a formal training program for its officers. However, VUU selected two officers on average each year to attend the Police Academy. According to VUU policy, individuals were sent to the Police Academy based on: (1) seniority; (2) employment with VUU for more than ninety days; (3) experience; (4) interest; (5) desire to attend the Police Academy; and (6) written evaluations. Attendance at the Police Academy enhanced an officer's professional skills and had a positive impact on promotional opportunities above the rank of corporal.

required the following in order to be promoted to the rank of lieutenant: (1) a minimum of one year as a VUU police officer with at least one year as sergeant or of supervisory experience; (2) no arrests for a criminal offense in the past twenty-four months unless found not guilty in a court of law; (3) ratings of satisfactory or above in all areas on the most recent performance evaluation; (4) service with good conduct as evidenced by no disciplinary action within the previous twelve months; (5) submission of a letter of interest in promotion to the Department's Chief; and (6) passage of qualifying oral and written examinations.

A. Taylor.

In August 1992, Department Supervisor Simmons hired Taylor as a patrol officer upon Chief Wells' recommendation. Taylor served her mandatory ninety-day probationary period without incident. In May 1993, Wells rated Taylor's communication skills as "marginal" in a written performance evaluation and encouraged her to improve in that area. Wells rated Taylor's skills in all other areas, including initiative, dependability, and leadership, as satisfactory. ²

Despite giving Taylor a "marginal" rating with respect to her communication skills, Wells allowed Taylor to serve on a regular basis as Acting Shift Supervisor starting in August 1994. In this position, Taylor supervised all activities on the assigned shift, informed officers of Department policies and procedures as they applied to the shift, ensured compliance with Department policies and procedures, and assigned officers to work details.

After serving as Acting Shift Supervisor on a number of occasions, Taylor unsuccessfully sought promotion to the rank of corporal. According to VUU, Taylor's request for promotion was denied because of the marginal rating she had received in May 1993 with respect to her communication skills. According to Taylor, most of the

² At trial, Taylor's immediate supervisor during 1993 and 1994, Lieutenant Henry Yancey (Lieutenant Yancey), testified that he had problems with Taylor "getting the job done." (J.A. 213). In addition, Department Supervisor Miller testified at trial that Taylor exhibited a "lackadaisical attitude." (J.A. 198).

male officers who served as Acting Shift Supervisors were promoted to the rank of corporal. However, according to Department Supervisor Miller, a number of male officers who served as Acting Shift Supervisors, specifically Officers Anderson and Pittman, were not promoted to the rank of corporal.

Approximately two months after Taylor was denied promotion to the rank of corporal, in October 1994, Lieutenant Yancey responded to a complaint by a resident assistant that females were in the Omega fraternity room of Storer Hall in violation of VUU policy. Upon arriving at the entrance to the room, Lieutenant Yancey discovered the existence of a co-ed party. A member of the Omega fraternity then informed Lieutenant Yancey that one of the Department's female officers was in attendance as a guest. The officer was Taylor, who was off-duty. She had attended the party for "a little over . . . an hour."³ (J.A. 152). Her attendance was a direct violation of VUU policy regarding fraternization with students. Based upon Lieutenant Yancey's incident report and an investigation by Chief Wells, in November 1994, Chief Wells recommended to Department Supervisor Manning that Taylor be terminated.

In support of her discriminatory discharge claim, Taylor offered the testimony of Corporal Tommy Harrell (Corporal Harrell) that some male officers were not disciplined for having "contact" with female students. (J.A. 84-85). Corporal Harrell did not describe what type of contact was involved. Taylor also relied upon her own testimony that "there were several incidents where students would say that there were male officers who were engaged in sexual relationships with female students and bragging about it all over campus," and VUU officials did "nothing." (J.A. 153).

One of the issues in this appeal stems from the fact that Taylor was never selected to attend the Police Academy. At trial, Taylor testified that Chief Wells assured her that she would be sent to the Police Academy. Nevertheless, Taylor claims that she was not sent to the Police Academy during her twenty-six month tenure with the Depart-

³ Lieutenant Yancey filed an incident report stating that Taylor attended the party and had been drinking. Taylor denies drinking any alcohol at the party.

ment because she is female. In support of her claim, Taylor put forth the following testimony by Lieutenant Quinton Terry (Lieutenant Terry): "I asked [Chief Wells] one day was he going to send Ms. Johnson to the Police Academy with me because I knew I was getting ready to go to the Academy. He stated to me he was never going to send a female to the Academy." (J.A. 70). Furthermore, Corporal Harrell testified that Chief Wells had once referred to Taylor as a "stupid bitch," and asked him if he was sleeping with her. (J.A. 82).

B. Johnson.

In July 1993, Department Supervisor Simmons hired Johnson as a patrol officer upon Chief Wells' recommendation. She served the mandatory ninety-day probationary period without incident. Like Taylor, Johnson also served regularly as Acting Shift Supervisor. Chief Wells rated Johnson as satisfactory or above in all of the categories listed on her April 1994 performance evaluation, the only one during Johnson's fourteen month tenure with the Department.

In May 1994, Johnson sent a letter to Chief Wells expressing her desire to apply for promotion to the rank of lieutenant. According to Johnson, Chief Wells then told her, "I don't know why you can't be the next lieutenant around here." (J.A. 136). To achieve that end, Johnson took both the requisite written and oral examinations. The examinations were conducted by a panel consisting of Lieutenant Yancey of the Department, a police officer from Virginia Commonwealth University's police department, and a police officer from the City of Richmond's police department. In August 1994, after the examination process was complete, VUU compiled the panel's results in a final ranking. Quinton Terry, who was a patrol officer at the time, finished three points higher than Johnson and was promoted to the rank of lieutenant.

In September 1994, fourteen months after she was hired as a VUU patrol officer, Johnson sent a letter to Chief Wells expressing how much she had enjoyed working under him but was resigning to "further develop [her] career in areas that [were] more in line with [her] long term goals." (J.A. 370). Department Supervisor Manning, upon receipt of Johnson's letter of resignation, attempted unsuccessfully to change Johnson's mind. Department Supervisor Manning then

allowed and encouraged Johnson to adjust her termination date so that she could collect an extra four days of pay.

Also at issue in this appeal is the fact that Johnson, like Taylor, was never selected to attend the Police Academy. In support of her claim that her failure to be selected to attend the Police Academy was a result of Chief Wells' discriminatory animus toward women, like Taylor, Johnson relies upon the exchange between Chief Wells and Lieutenant Terry during which Chief Wells stated he was "never going to send a female to the Academy." (J.A. 70). Johnson admitted at trial, however, that some of the male officers at VUU had waited as long as three years before being selected to attend the Police Academy. The evidence in the record is also undisputed that no Department officer with less seniority than Johnson was selected to attend the Police Academy. One male officer with the same amount of seniority as Johnson, Lieutenant Terry, however, was selected to attend the Police Academy in the summer of 1994.

Also in support of her claims, Johnson testified at trial that at times during her tenure with the Department, Chief Wells: (1) talked to her in his office with the door shut; (2) told her she would be promoted if she "did the right thing"; (3) told her she looked good in her uniform; and (4) touched her on the arm or shoulder when he spoke to her. (J.A. 106-07).

C. Equal Employment Opportunity Commission.

Taylor and Johnson both filed complaints against VUU with the Equal Employment Opportunity Commission (EEOC). Taylor's EEOC complaint alleged failure to be selected to attend the Police Academy on account of her gender and discriminatory discharge on account of her gender. Johnson's EEOC complaint alleged that she was denied training and promotion because of her gender. She also attached an affidavit attesting to the following:

On several times [Chief Wells] called me at home on thing [sic] that could wait until the next day. He has touched me on the arm on several times while talking to me. He stated he hire me [sic] because he liked me. He has called my Military Reserve (Sgt. Dixon) Unit to discuss with my supervi-

sor that he was in the process of promoting. He has called me into his office for hours at a time, away from job to talked [sic] to me.

(J.A. 353). On April 1, 1996, both Taylor and Johnson received a "notice of right to sue" from the EEOC.

D. The District Court.

On June 27 and 28, 1996, respectively, Taylor and Johnson filed the present actions against VUU, which were later consolidated for purposes of trial. Taylor's complaint alleged that she was denied promotion to the rank of corporal, denied the opportunity to attend the Police Academy, and discharged because of her gender, female, in violation of Title VII of the Civil Rights Act of 1964, as amended (Title VII). See 42 U.S.C. §§ 2000e through 2000e-17. Johnson's complaint alleged that she was denied promotion to the rank of corporal or higher, denied the opportunity to attend the Police Academy, and constructively discharged because of her gender, female, in violation of Title VII. See id.

Prior to trial, all parties moved for summary judgment with respect to all claims. The district court denied these motions in all respects, except for Johnson's sexual harassment claim. On that claim, the district court granted summary judgment in favor of VUU. Accordingly, Johnson's remaining claims and all of Taylor's claims proceeded to trial.

At the conclusion of all the evidence, the district court granted VUU's motion for judgment as a matter of law with respect to all of Taylor's claims. However, the district court sent Johnson's remaining claims to the jury. The jury returned a verdict in favor of VUU on all of Johnson's remaining claims. Taylor and Johnson noticed timely appeals.

II.

Taylor contends the district court erroneously granted VUU's motion for judgment as a matter of law with respect to her claims

alleging gender discrimination in her being denied promotion to the rank of corporal, her not being selected to attend the Police Academy, and her being discharged. The majority agrees with Taylor's contention, and thus reverses the district court's grant of judgment as a matter of law to VUU with respect to Taylor's claims and remands for further proceedings. I disagree.

As the moving party, VUU was entitled to prevail on its motion for judgment as a matter of law if during the jury trial, after being fully heard, "there [was] no legally sufficient evidentiary basis for a reasonable jury to find" in Taylor's favor. Fed. R. Civ. P. 50(a)(1). We review the district court's grant of VUU's motion for judgment as a matter of law with respect to Taylor's claims *de novo*, viewing the evidence in the light most favorable to Taylor. See Brown v. CSX Transp., Inc., 18 F.3d 245, 248 (4th Cir. 1994).

A. Failure to Promote.⁴

Taylor claims, and the majority agrees, that she successfully met her burden of proof under the McDonnell Douglas burden-shifting proof scheme on her claim of failure to promote. See McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973). McDonnell Douglas contains a familiar three-step burden-shifting proof scheme. See St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502, 511 (1993); Evans v. Technologies Applications & Serv. Co., 80 F.3d 954, 959 (4th Cir. 1996). The first of the three steps requires Taylor to establish a *prima facie* case. To establish a *prima facie* case of discriminatory failure to promote, Taylor must demonstrate by a preponderance of the evi-

⁴ Taylor brings this claim despite her failure to allege it in her EEOC complaint. While VUU's motion for summary judgment on Johnson's sexual harassment claim, discussed *infra*, was granted based on Johnson's failure to exhaust her administrative remedies, no such defense was raised regarding Taylor's failure to promote claim. In Title VII actions, failure to exhaust administrative remedies is an affirmative defense. See Young v. Nat'l. Ctr. for Health Servs. Research, 828 F.2d 235, 238 (4th Cir. 1987). Because failure to exhaust administrative remedies is an affirmative defense, VUU waived it by failing to assert it below. See Jean v. Collins, 155 F.3d 701, 713 (4th Cir. 1998) (en banc) (citing Gomez v. Toledo, 446 U.S. 635, 640 (1980)).

dence that: (1) she is a member of a protected class; (2) her employer had an open position for which she applied; (3) she was qualified for the position; and (4) she was rejected for the position under circumstances giving rise to an inference of unlawful discrimination. See Hughes v. Bedsole, 48 F.3d 1376, 1383 (4th Cir. 1995); Carter v. Ball, 33 F.3d 450, 458 (4th Cir. 1994). The other two steps are not reached unless and until Taylor satisfies her burden. See id.

Taylor cannot meet the third element of a prima facie case -- demonstration by a preponderance of the evidence that she was qualified for the rank of corporal. The evidence is undisputed that to qualify for promotion to the rank of corporal, the candidate must have: (1) a minimum of six months as a VUU patrol officer; (2) no arrests for a criminal offense in the past twenty-four months unless found not guilty in a court of law; (3) ratings of satisfactory or above in all areas on the patrol officer's most recent performance evaluation; and (4) service with good conduct as evidenced by no disciplinary action within the previous six months. Taylor was not qualified for promotion because she had received a rating of "marginal" in the category of communication on her most recent performance evaluation. Accordingly, Taylor cannot make out a prima facie case, and therefore, cannot survive VUU's motion for judgment as a matter of law.

The majority makes light of Taylor's performance evaluation because Taylor was evaluated by Chief Wells. Such a position overlooks this court's holding that if:

the employee was hired and fired by the same person within a relatively short time span . . . this fact creates a strong inference that the employer's stated reason for acting against the employee is not pretextual. . . . In short, employers who knowingly hire workers within a protected group seldom will be credible targets for charges of pretextual firing.

Jimenez v. Mary Washington College, 57 F.3d 369, 377 (4th Cir. 1995); see also Proud v. Stone, 945 F.2d 796, 798 (4th Cir. 1991). Chief Wells was instrumental in hiring Taylor in August 1992, and evaluated her in April 1993, eight months later. While Taylor was not fired at the time of her evaluation, Chief Wells should still be given the benefit of the "same hirer-same firer" inference. It strains credulity

to believe that Chief Wells would have falsely rated Taylor as marginal in her performance evaluation only eight months after he recommended that she be hired, so that he could prevent her from being promoted to the rank of corporal. Further, both Department Supervisor Miller and Lieutenant Yancey corroborated Chief Wells' assessment of Taylor's poor job performance. Lieutenant Yancey testified at trial that Taylor had problems "getting the job done," (J.A. 213), and Department Supervisor Miller testified that Taylor exhibited a "lackadaisical attitude." (J.A. 198). There is no evidence in the record that either of these individuals held any discriminatory animus toward women. These factors support the conclusion that Taylor's evaluation was an accurate assessment of her job performance and not merely the demonstration of discriminatory animus toward women on the part of Chief Wells.

Accordingly, because there was no legally sufficient evidentiary basis for a reasonable jury to find that Taylor was qualified for the rank of corporal, the district court properly granted VUU judgment as a matter of law on Taylor's failure to promote claim.

B. Police Academy Claim.

Taylor contends, and the majority agrees, that the district court erred in granting VUU's motion for judgment as a matter of law with respect to her Police Academy claim. In this regard, both Taylor and the majority believe that she is entitled to enjoy the more advantageous standard of liability applicable in mixed-motive cases. I disagree on all fronts.

A plaintiff qualifies for the more advantageous standard of liability applicable in mixed-motive cases, if the plaintiff presents "direct evidence that decision makers placed substantial negative reliance on an illegitimate criterion." Fuller v. Phipps, 67 F.3d 1137, 1142 (4th Cir. 1995) (quoting Price Waterhouse v. Hopkins, 490 U.S. 228, 277 (1989) (O'Connor, J., concurring)). Such a showing requires "evidence of conduct or statements that both reflect directly the alleged discriminatory attitude and that bear directly on the contested employment decision." Id. If the plaintiff satisfies this evidentiary threshold, the burden of persuasion shifts to the employer to prove that "it would have reached the same determination without any discriminatory ani-

mus" Id. The determination of whether a plaintiff has satisfied this evidentiary threshold is a decision for the district court after it has reviewed the evidence, see id. at 1142, which "ultimately hinges on the strength of the evidence establishing discrimination." Id. at 1143.

The bonus for plaintiffs able to invoke the standard of liability applicable in mixed-motive cases is that proof by the employer that it would have reached the same determination without any discriminatory animus does not allow the employer to avoid liability altogether. Rather, such proof only limits the remedies available to the plaintiff. See id. at 1142. Absent the threshold showing necessary to invoke the standard of liability applicable in mixed-motive cases, however, a plaintiff must prevail under the less advantageous standard of liability applicable in pretext cases. See id. at 1143.

According to the majority, the following testimony by Lieutenant Terry is sufficient to trigger the mixed-motive standard of liability with respect to Taylor's Police Academy claim: "I asked [Chief Wells] one day was he going to send Ms. Johnson to the Police Academy with me because I knew I was getting ready to go to the Academy. He stated to me he was never going to send a female to the Academy." (J.A. 70).

I completely disagree with the majority's conclusion. While Chief Wells' statement reflects directly his alleged discriminatory attitude toward women, because Chief Wells made the statement in response to Lieutenant Terry's question as to whether Johnson would be joining him in attending the Police Academy, the statement obviously does not "bear directly on the contested employment decision," i.e., Chief Wells' decision not to send Taylor to the Police Academy. Accordingly, under our circuit precedent, the mixed-motive standard of liability is not triggered. See Fuller, 67 F.3d at 1142.

Taylor, therefore, bears the burden of establishing her Police Academy claim under the McDonnell Douglas burden-shifting proof scheme applicable in pretext cases. See McDonnell Douglas, 411 U.S. at 802. To establish a prima facie case of disparate treatment in a pretext case, Taylor must demonstrate that: (1) she is a member of a protected class; (2) she was qualified to attend the Police Academy; (3) she was not selected to attend the Police Academy; and (4) other offi-

cers who are not members of the protected class were selected to attend the Police Academy under similar circumstances. See Hughes, 48 F.3d at 1383; Carter, 33 F.3d at 458.

At a minimum, Taylor cannot establish the fourth element of her prima facie case. Critically, during Taylor's tenure at the Department, Chief Wells never sent any VUU officer to the Police Academy with less qualifications than or similar qualifications to Taylor. During Taylor's two years of employment with the Department, there were six Police Academy slots available for VUU officers. According to VUU policy, these slots were to be filled with officers based on their: (1) seniority; (2) employment with VUU for more than ninety days; (3) experience; (4) degree of professional motivation; (5) desire to attend the Police Academy; and (6) written evaluations.

The evidence is overwhelming and undisputed that Taylor was not as qualified as the male officers when these six criteria are considered as a whole. Specifically, of the six officers selected: (1) Dawson had been employed by VUU as an officer since 1990, two years more than Taylor, and had received higher performance evaluations; (2) Ortiz had more seniority than Taylor; (3) Lieutenant Terry had received a higher performance evaluation than Taylor and had seven years of military experience prior to joining the Department; (4) Tregre had three years experience with VUU, a college degree, security guard experience, and had received higher performance evaluations than Taylor; (5) Jones had been a police firearms instructor, had attended the United States Marine Security Force School, and had six years of military experience, although Taylor had more VUU service time; and (6) Morrison had received higher performance evaluations and had military experience, although Taylor had more VUU service time.

Furthermore, unlike Taylor, all of these officers expressed an interest in being promoted to the rank of sergeant or lieutenant. Department Supervisor Manning testified that Taylor told him that she only wanted to be a patrol officer and did not want any responsibility. Indeed, Taylor herself testified at trial that she was only interested in promotion to the rank of corporal, a position for which Police Academy training was not necessary. Taylor's express lack of interest in promotion to any rank above corporal and lack of interest in assuming responsibility is significant, because the degree of a candidate's pro-

fessional motivation was a factor considered by Chief Wells in selecting officers to attend the Police Academy. Taylor also conceded at trial that Officers Pittman and Anderson, both of whom are male and had been at VUU longer than Taylor, had not attended the Police Academy.

In sum, Taylor has not produced legally sufficient evidence for a reasonable jury to conclude that male officers were selected to attend the Police Academy under similar circumstances. Indeed, she has produced no such evidence. Furthermore, Taylor has produced no evidence to rebut VUU's proffered legitimate nondiscriminatory reason for not selecting Taylor to attend the Police Academy -- considering the totality of the stated factors, all of the male officers selected were more qualified. Accordingly, I would affirm the district court's grant of VUU's motion for judgment as a matter of law on Taylor's Police Academy claim.

C. Discriminatory Discharge.

Taylor also contends, and the majority also agrees, that the district court erred in granting VUU's motion for judgment as a matter of law with respect to her discriminatory discharge claim. Again, I disagree.

Taylor premises her discriminatory discharge claim on her assertion that male officers in the Department also fraternized with VUU students but escaped discipline. For Taylor to avoid VUU's motion for judgment as a matter of law, she must, at a minimum, demonstrate a prima facie case of disparate treatment in the manner in which she was discharged. See Gibson v. Old Town Trolley Tours, 160 F.3d 177, 180-82 (4th Cir. 1998). Thus, Taylor must demonstrate by a preponderance of the evidence that: (1) she is a member of a protected class; (2) she was qualified for the job and her job performance was satisfactory; (3) she was discharged; and (4) other employees outside the protected class were retained under apparently similar circumstances. See Bedsole, 48 F.3d at 1383; Moore v. City of Charlotte, 754 F.2d 1100, 1105-06 (4th Cir. 1985).

First, Taylor cannot meet the fourth element of a prima facie case. The only evidence offered by Taylor in support of the fourth element is: (1) her own testimony repeating statements by unidentified VUU

students;⁵ and (2) Corporal Harrell's vague testimony that unidentified male officers were not disciplined for having "contact" with students. (J.A. 84-85). Critically absent from this offer of proof is any evidence legally sufficient for a reasonable jury to conclude that Taylor was disciplined more harshly than her fellow male officers who engaged in fraternization with VUU students of a same or similar nature to her attendance for about an hour at the fraternity party in direct violation of VUU policy. See Cook v. CSX Transp. Corp., 988 F.2d 507, 511 (4th Cir. 1993) (holding that when sorting out disparate discipline claims under Title VII, a comparison of the discipline imposed for like offenses is required). Taylor's testimony repeating hearsay statements made by unidentified VUU students indicating that unidentified male officers were engaged in sexual relationships with unidentified female students without discipline by VUU is wholly insufficient to establish discriminatory discharge. See EEOC v. Watergate at Landmark Condominiums, 24 F.3d 635, 639 (4th Cir. 1994) (citing Guthrie v. Tifco Industries, 941 F.2d 374, 379 (5th Cir. 1991) (statements that are "vague and remote in time . . . are insufficient to establish discrimination")); cf. Simpson v. Welch, 900 F.2d 33, 35 (4th Cir. 1990) (holding that mere allegations without descriptions of specific incidents . . . insufficient to state a claim under Title VII). Corporal Harrell's testimony is equally vague and conclusory. See Cook, 988 F.2d at 511.

Second, Taylor's behavior was indeed of a serious nature, because her attendance at the fraternity party was in flagrant disregard of VUU's policy that no females be allowed in fraternity rooms and obviously gave students at the party the impression that the rule had been at least momentarily suspended. Taylor's behavior thus undermined her authority as an officer of the Department and undermined the force of VUU's no-females-in-fraternity-rooms policy. In sum, her failure to establish a prima facie case under McDonnell Douglas is fatal to her claim.

⁵ This testimony is hearsay under Federal Rule of Evidence 802. However, because VUU did not object to this testimony at trial, VUU has waived any right to question its admissibility on appeal. See United States v. Parody, 703 F.2d 768, 783 (4th Cir. 1983) (stating that "to preserve for appellate review an objection to evidence, the objection must be (1) specific, (2) timely and (3) of record."). Parenthetically, VUU did not raise this issue on appeal.

Because there is no legally sufficient evidentiary basis for a reasonable jury to find in Taylor's favor on any of her claims, I would affirm the district court's grant of judgment as a matter of law in favor of VUU on all of Taylor's claims.

III.

According to Johnson, she is entitled to a new trial on all of her claims that went to the jury, because the district court erroneously excluded evidence that Chief Wells once stated that he bet a certain unidentified woman had "good pussy" and evidence that Chief Wells called a female VUU employee named Angela Sheridan at home on several occasions, touched her, and told her that he had looked down her blouse once when standing behind her. The majority agrees with Johnson.

In my view, Johnson's contention is without merit. We review the district court's exclusion of this proffered evidence for abuse of discretion. See Persinger v. Norfolk & Western Ry. Co., 920 F.2d 1185, 1187 (4th Cir. 1990).

A. Evidentiary Rulings.

The district court properly excluded Johnson's proffered evidence that Chief Wells once stated that a certain woman "had good pussy," because it does not have "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Fed. R. Evid. 401. Under our circuit precedent, not cited by the majority, stray or isolated comments by a decision maker, which are completely unconnected to the employment decision-making process, are not probative of discriminatory animus. See O'Connor v. Consolidated Coin Caterers, 56 F.3d 542, 548-50 (4th Cir. 1995) (holding in a discriminatory discharge case alleging age discrimination that comments directed at plaintiff by decision maker that plaintiff was "'too damn old for this kind of work'; and was just "'too old'" to play golf; and comment by the decision maker in general that "'[i]t's about time we get some young blood in this company,'" do not evince age-related discriminatory animus), rev'd on other grounds, 517 U.S. 308 (1996). There is no evidence or even a proffer of evidence that Chief Wells'

alleged comment that a certain woman had "good pussy" amounted to anything more than a stray and isolated comment on his part. Furthermore, the comment was completely unconnected to the decisional process with respect to Johnson's failure to be promoted to the rank of corporal or lieutenant, failure to be selected for attendance at the Police Academy, and alleged constructive discharge. Therefore, under our circuit precedent, the comment is not at all probative of discriminatory animus toward women on the part of Chief Wells. Accordingly, I would affirm the district court's exclusion of evidence of Chief Wells' comment.

The district court also properly excluded the proffered testimony of Angela Sheridan, a VUU employee, that Chief Wells called her at home on several occasions, touched her, and told her that he had looked down her blouse once when standing behind her. This evidence does not have "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Fed. R. Evid. 401. While the majority correctly quotes Warren v. Halstead Industries, Inc., 802 F.2d 746, 753 (4th Cir. 1986), for the proposition that evidence of harassment in the workplace of the same nature as the discrimination claims at issue is relevant to the determinations of intent and pretext, the proffered testimony of Angela Sheridan falls far short of evidencing sexual harassment in the workplace on the part of Chief Wells. Critically, Johnson did not proffer whether Angela Sheridan would testify that she even worked in the Department or was otherwise under Chief Wells' supervision. Without this context, the proffered testimony is simply not probative of a discriminatory intent on the part of Chief Wells or any other VUU decision makers. Accordingly, I would affirm the district court's exclusion of the proffered testimony of Angela Sheridan.

B. Harmless Error Analysis.

Moreover, even assuming arguendo that the district court erred in excluding evidence that Chief Wells once stated that he bet a certain unidentified woman had "good pussy" and evidence that Chief Wells called a female VUU employee named Angela Sheridan at home on several occasions, touched her, and told her that he had looked down her blouse once when standing behind her, such errors amount to

harmless error under Federal Rule of Civil Procedure 61. Federal Rule of Civil Procedure 61 commands that we must "disregard any error or defect in the proceeding which does not affect the substantial rights of the parties." Id. As long as we are "able to say `with fair assurance, after pondering all that happened without stripping the erroneous action from the whole, that the judgment was not substantially swayed by the error,'" we must conclude that the alleged errors did not affect Johnson's substantial rights. United States v. Heater, 63 F.3d 311, 325 (4th Cir. 1995). Applying this test to each of Johnson's claims reveals that she is not entitled to a new trial on those claims.

1. Failure to Promote

Johnson alleges that VUU denied her promotion to the rank of corporal or higher because of her gender. Given that this matter proceeded through a jury trial on the merits, "we no longer concern ourselves with the vagaries of the prima facie case because, subsequent to a trial in a Title VII action, the ultimate issue is one of discrimination vel non," Jimenez, 57 F.3d at 377. In this posture, the McDonnell Douglas "paradigm of presumption created by establishing a prima facie case `drops from the case,' and `the factual inquiry proceeds to a new level of specificity.'" Id. (citing Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 256 n. 10 (1981)). This factual inquiry is whether VUU intentionally discriminated against Johnson. See Burdine, 450 U.S. at 253. Johnson bears the burden of persuasion on this issue. See id. at 256. To meet her burden, Johnson must prove both that the reasons given by VUU were false, and that discrimination was the real reason. See St. Mary's, 509 U.S. at 517.

Notably, in meeting her burden of persuasion, Johnson must overcome the presumption that any input by Chief Wells into whether she would be promoted was not motivated by discriminatory animus. Such a presumption exists because Chief Wells had recommended that she be hired just a year earlier. See Jimenez, 57 F.3d at 377 (holding that "'powerful inference'" that discrimination did not motivate the decision maker is created when the decision maker had hired the plaintiff only a relatively short time prior to making the challenged decision) (quoting Proud, 945 F.2d at 798)); Tyndall v. National Educ. Centers, 31 F.3d 209, 214-215 (4th Cir. 1994) (holding that

employer was entitled to "same hirer-same firer" inference when decision maker had hired plaintiff nineteen months earlier).

With respect to the rank of corporal, Johnson relied at trial on her own testimony and that of Taylor that all of the male officers who served as Acting Shift Supervisor were promoted to the rank of corporal. She also relied on the testimony of Lieutenant Terry that Chief Wells commented that he would never send a woman to the Police Academy in response to his (Lieutenant Terry's) query as to whether Johnson would be joining him at the Police Academy. Finally, she relied upon Corporal Harrell's testimony that Chief Wells referred to Taylor as a "stupid bitch," (J.A. 82), and queried whether Corporal Harrell had slept with Taylor. With respect to the rank of lieutenant, she relied upon all of this same evidence, except for her own testimony and that of Taylor that all of the male officers who served as Acting Shift Supervisor were promoted to the rank of corporal.

The jury considered all of this evidence and still concluded that Johnson had not carried her burden of persuasion: (1) that the reason given by VUU for failing to promote her to the rank of corporal--she was not the most qualified candidate for the position⁶--and the reason given by VUU for failing to promote her to the rank of Lieutenant--she ranked lower than the individual chosen for the position after an extensive examination process by a panel of experienced law enforcement officers--were false, and (2) that discrimination was the real reason. See St. Mary's, 509 U.S. at 517. Considering the powerful inference that any input by Chief Wells into whether Johnson would be promoted was not motivated by discriminatory animus and the complete lack of evidence that any other decision maker held discriminatory animus toward women, one is able to say with fair assurance, after pondering all that happened, that the absence of the alleged erroneously excluded evidence did not substantially sway the jury's decision.

⁶ Additionally, the jury had before it evidence that a number of male officers, some with more seniority and experience than Johnson, served regularly as Acting Shift Supervisors without receiving promotion to the rank of corporal until they had been with the Department for several years. For example, Alfred Pittman was with the Department for four and one half years and regularly served as Acting Shift Supervisor prior to being promoted to the rank of corporal.

2. Police Academy

Johnson also alleges that VUU prevented her from attending the Police Academy because of her gender. After a full trial with the benefit of a Price Waterhouse jury instruction submitted by Johnson, the jury returned a verdict in favor of VUU on Johnson's Police Academy claim. Thus, after considering the evidence presented by both sides, the jury was not ultimately persuaded that Johnson should prevail. Common sense compels the conclusion that if the jury rejected her Police Academy claim in the face of Lieutenant Terry's testimony that Chief Wells stated he would never send a woman to the Police Academy in response to his (Lieutenant Terry's) query as to whether Johnson would be joining him at the Police Academy, throwing the alleged erroneously excluded evidence into the mix would not have changed the outcome. In short, one may say with more than fair assurance that the jury was not substantially swayed by the alleged errors. Thus, any error in the allegedly erroneously excluded evidence was harmless.

3. Constructive Discharge

Johnson also claims that she was constructively discharged because of her gender. As a threshold matter, Johnson was required to prove that VUU deliberately made her working conditions "intolerable" in an effort to induce her to quit. See Martin v. Cavalier Hotel Corp., 48 F.3d 1343, 1353-54 (4th 1995). In order to meet this burden, Johnson had to prove: (1) VUU's actions of which she complains were deliberately done; and (2) her working conditions were intolerable. Id. at 1354. Deliberateness exists only if the actions complained of were intended by the employer as an effort to force the plaintiff to quit. See Bristow v. The Daily Press, Inc., 770 F.2d 1251, 1255 (4th Cir. 1985) (quotations omitted). Whether a plaintiff's working conditions were intolerable is assessed by the objective standard of whether a "reasonable person" in the plaintiff's position would have felt compelled to resign. See id.

Johnson's constructive discharge claim is premised upon her testimony that Chief Wells touched her on the arm, called her at home on numerous occasions, talked to her in his office with the door shut, told her she looked good in her uniform, and told her that she would be

promoted if she did the right thing. VUU offered evidence that Johnson parted from VUU upon pleasant terms. For example, in her letter of resignation addressed to Chief Wells, she stated that "she enjoyed working under [his] direction." (J.A. 370). The jury considered all of this evidence and found in favor of VUU. Considering the elements of proof of a constructive discharge claim and the mix of relevant evidence before the jury, common sense compels the conclusion that throwing the alleged erroneously excluded evidence into the mix would not have changed the outcome. In other words, given the evidence considered by the jury, one can say with fair assurance that the alleged errors did not sway the jury's decision on this claim.

IV.

Finally, I consider Johnson's appeal of the district court's grant of summary judgment in favor of VUU on her sexual harassment claim. The district court concluded that VUU was entitled to summary judgment on Johnson's sexual harassment claim because she had not exhausted her administrative remedies. We review the district court's grant of summary judgment *de novo*. See Sheppard & Enoch Pratt Hosp. v. Travelers Ins. Co., 32 F.3d 120, 123 (4th Cir. 1994).

In order to assert a Title VII claim in federal court, a plaintiff must have exhausted her administrative remedies with respect to the claim. "Only those discrimination claims stated in the[administrative] charge, those reasonably related to the original complaint, and those developed by reasonable investigation of the original complaint may be maintained in a subsequent Title VII lawsuit." See Evans, 80 F.3d at 963. This exhaustion requirement is meant to preserve judicial economy by barring claims that have not been sufficiently investigated following an EEOC complaint. See Dennis v. County of Fairfax, 55 F.3d 151, 156 (4th Cir. 1995).

Contrary to the majority, I do not believe that Johnson's EEOC complaint sufficiently alleged a claim of sexual harassment. The relevant portion of the affidavit that Johnson filed with her EEOC complaint reads as follows:

On several times [Chief Wells] called me at home on thing [sic] that could wait until the next day. He has touched me

on the arm on several times while talking to me. He stated he hire me [sic] because he liked me. He has called my Military Reserve (Sgt. Dixon) Unit to discuss with my supervisor that he was in the process of promoting. He has called me into his office for hours at a time, away from job to talked [sic] to me.

(J.A. 353).

This passage is extremely vague. It never raises even the inference that these actions were done in a manner that had the purpose or intent of sexually harassing Johnson. In fact, the actions about which Johnson complains normally occur within the employer-employee relationship. Employers normally: (1) contact employees at home; (2) hire people they like; and (3) talk to their employees for extended time periods when necessary. Furthermore, it is commonplace for an individual to touch the arm of someone with whom they are talking, for example, to emphasize a point. Accordingly, even construing Johnson's EEOC charge liberally, she did not exhaust her administrative remedies with respect to her sexual harassment claim. Therefore, I would affirm the district court's grant of summary judgment in favor of VUU on this claim.

V.

For the reasons set forth herein, I concur with the majority opinion that: (1) VUU's alleged failure to promptly issue firearms to Johnson and Taylor was not discriminatory; and (2) evidence of Chief Wells' solicitation of a prostitute in 1995 was properly excluded by the district court. However, I respectfully dissent from the remainder of the majority opinion. I would affirm the district court in all respects.